SUPREME COURT, U. S.

FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 940

PHILIP J. KENNEY, Petitioner,

v.

AMERICAN CAN COMPANY, a corporation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILIP J. KENNEY, Plaintiff, vs. AMERICAN CAN COMPANY, a corporation, Defendant.	Civil No. 66-451 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action come on regularly for trial before the undersigned Judge of the above entitled Court on Monday, July 3, 1967 at 9:30 o'clock A.M. Plaintiff appeared in propria persona and defendant appeared by and through John Hoxie and James C. Dezendorf of its attorneys. After opening statements plaintiff was duly sworn and testified and exhibits offered by him were received in evidence. Thereafter evidence offered by defendant was heard and exhibits offered by defendant were received. Thereupon the Court offered plaintiff the opportunity to and including Monday, July 24, 1967 to submit written interrogatories to be answered by George W. Reiber, an employee-attorney for defendant, and by John H. Midney, a former employee-attorney for defendant. Thereafter arguments of plaintiff and of counsel for defendant were heard at the conclusion of which the Court directed counsel for defendant to prepare Findings of Fact, Conclusions of Law and Judgment in favor of defendant, reserving the right to plaintiff, if he wished to do so, to submit written interrogatories to be answered by Messrs. Reiber and Midney. Plaintiff having submitted no interrogatories to be submitted to Messrs. Reiber and Midney on or before

July 24, 1967, and the Court being fully advised, hereby makes and enters the following:

FINDINGS OF FACT

I.

Plaintiff, Philip J. Kenney, is a resident of Oregon, and defendant, American Can Company, is a New Jersey Corporation which does business in Oregon.

II.

The complaint, the amended complaint and plaintiff's contentions in the pretrial order purport to state claims under three counts which are not entirely clear in meaning, either as to all of their propositions of fact or their propositions of law or their theory of claim, but all of which hinge on the assertion that for the "easy-open" sealing means of a certain can made and sold by defendant since 1963 defendant used something which had been disclosed to it by plaintiff in 1955 and which defendant was under obligation not to use. It is not necessary to resolve all of the questions concerning these three counts because this charge of misappropriation is basic to all of them.

III.

In March, 1955, after learning from a publication on the submission of ideas to companies that defendant had a "Form 2538" for the purpose, plaintiff wrote to defendant saying that he had an invention with "Patent Pending" which he would like to submit and asking for copies of Form 2538, which defendant thereupon sent to him.

IV.

In August, 1955, plaintiff filled out and executed two copies of Form 2538, from which he

deleted one clause and in which, and in an accompanying letter, he described his idea for a quick and easy means of opening cans without the use of a key. Because of the deletion, an attorney-employee of defendant told plaintiff that his tendered disclosure was informal and that defendant could not accept his idea for consideration, whereupon correspondence ensued in September and October in which plaintiff said that he would not accept all of Form 2538 and in which defendant repeated its insistance that, if it were to consider plaintiff's idea, it would have to be submitted in accordance with all of the provisions of Form 2538.

V.

In November, 1955, however, plaintiff filled out and sent to defendant two new copies of Form 2538 with no deletion, and in these and in an accompanying letter he described his idea, saying that this was in place of his letter of explanation sent in August.

VI.

In January, 1956, defendant informed plaintiff that it had considered his November submission, which it read as being substantially the same as his informally tendered submission of August, but would not be interested in his idea.

VII.

Plaintiff's idea as he described it in his communication of August, 1955, was to seal the circular joint between the body of a can and the depending circular flange of its top or cover by means of a surrounding strip having two parts, namely, an outer strip of aluminum foil and a narrower inner tear-strip or tape, adhered to the inner face of the outer strip, that inner tape providing at its end a free tab which could be grasped by the fingers to pull it around and unseal the

joint. In the unsealing, the action of the inner tape when so pulled was to sever the wider outer strip of foil down the middle so as to leave its two edge parts in their permanent securement to the top and body respectively of the can. For this securement, plaintiff described two expedients, namely, (a) a mechanical clamping expedient involving the folding over or crimping of the metal of the can body and of its cover to form flanges that would pinch the two edges of the outer strip against the metal, and (b) as an alternative, plaintiff said that the strip also can be "adhered to" the top and body of the can instead of rolling it under flanges. No particular adhesive was mentioned. He described also a paper tape to be wound over the top of the aluminum foil as a binder which would hold the cover on under pressure.

VIII.

Plaintiff's idea as described in his November 1955 communication was the same multiple-layer strip, with an inner tear-tape, as in his August 1955 communication, with the exceptions that, in November, he did not mention the alternative way of securing the outer foil strip to the top and the body of the can by adhesion, instead of securing it by the described clamping flanges, and that he did not include the further element of a paper tape binder outside the two-part sealing strip.

IX.

In none of his 1955 communications did plaintiff describe or in any way suggest a seal consisting of a single strip of foil secured to the metal of the can top and the can body by an adhesive that would seal the joint but would permit that strip to be peeled off as an entirety to unseal the can; the only form of sealing strip described by plaintiff having been the two-part strip and the only manner of unsealing described by him having been the unsealing by use of the narrower inner tear-tape to

sever the outer foil strip length-wise, the edge parts of that outer strip above and below the severance then remaining secured to the metal either by their clamping flanges or by their permanent adhesion to the metal.

X.

Defendant's can against which plaintiff's charge is laid is described in its Schneider patent No. 3,186,581 of 1965, applied for in December 1962, and employs as its means of sealing the circular joint a single strip of aluminum foil which spans the joint and is secured to the metal above and below the joint by a special adhesive, exemplified by an ethylene-acrylic acid copolymer, which provides the necessary tightness of seal, but, by reason of its low resistance to peel, permits the aluminum foil to be peeled off as an entirety, with no tear-tape and no severance of the foil strip.

XI.

There is no evidence and no basis for an inference that in devising or adopting this form of sealing means defendant made any resort to or derived anything from the communications from plaintiff in 1955, which are kept in a file of many hundreds of submitted suggestions with no subject-matter index; and this form of single-layer sealing strip used by defendant, with its adhesive of low peel resistance permitting its removal as an entirety, is distinct from plaintiff's multiple layer strip in which unsealing is effected by action of the inner tape in severing the outer foil strip, leaving the two edge parts of the latter in their permanent securement to the metal.

XII.

Plaintiff's patent application of January 1955, not disclosed to defendant but alluded to in plaintiff's communications of 1955 as a "Patent

Pending" on his idea, described only his multiple layer sealing strip employing the idea of severance for unsealing, and described as the means of securing the edges of the outer strip to the can top and can body only the use of an adhesive; and neither in that patent application, which was abandoned, nor in two subsequent patent applications of 1961 and 1964 did plaintiff describe the idea of a single strip of aluminum foil secured to the metal by an adhesive permitting it to be peeled off as an entirety.

XIII.

Before 1955, a single layer sealing strip (tape) adhered to the top and to the body of a can, running around the circular joint between the two, and removable by being peeled off as an entirety, had been described in a number of patents including one as early as 1890 and including two patents granted to defendant; and in relation to this form of seal the use of aluminum foil as the single-layer material had been described in patents of that prior time.

XIV.

Also, before 1955, there were patents which described the multiple-layer, tear-strip style of seal which plaintiff adopted, with its inner tape or cord serving as the means of unsealing by severance of the outer strip, although without plaintiff's feature of the clamping flanges as the means of securing the edge parts of the outer strip to the can top and the can body; and at least one of those patents was known to defendant and was brought to plaintiff's attention in 1955 both by defendant and by the Patent Office.

XV.

Defendant has not appropriated any idea disclosed to it by plaintiff; but, on the contrary,

with the exception of the particular adhesive of low peel resistance which defendant has used and which plaintiff did not disclose to it, defendant has used a form of single-layer, peel-off seal which was in the public domain prior to 1955.

XVI.

The dealings between the parties in 1955 did not rest upon or give rise to any expressed or mutually understood relation of trust and confidence. Not only did plaintiff not suggest in any way in 1955 that he was making a disclosure in confidence, but he knew in advance, from the express terms of Form 2538 which he did not delete in August 1955, and which were repeated in the full executed submission agreement of November 1955, that defendant would not receive a disclosure in confidence and would receive one only on all of the terms and conditions of its Form 2538 which expressly excluded any disclosure in confidence.

XVII.

Under the provisions of its Form 2538 which plaintiff accepted as the basis of his communications to defendant in 1955, defendant reserved its freedom to use things that already were in the public domain, even if included in what plaintiff disclosed; but because defendant did not use what plaintiff disclosed to it in 1955 it is not necessary to rest defendant's freedom on that reservation.

XVIII.

By express statements to defendant in and after 1955, plaintiff evidenced a reliance upon whatever patent protection he might obtain, rather than upon any premise of a disclosure in confidence; and although he has reserved his position on his patent No. 3,096,905 which he obtained on his application filed in 1961, in this action and in the pretrial order, he has made no charge of infringement of

that patent by defendant.

XIX.

Plaintiff disclosed his idea to a number of companies in the years 1955 to 1965 inclusive, and has not shown that in or after 1955 he treated it as a secret or took measures to protect it as a secret. His assertion is that none of these disclosures included the idea of a single-layer, peel-off strip adhered to the metal of the can top and can body, and that he withheld that idea, but it was not shown that he ever was in possession of that idea until he learned of defendant's can employing that different form of seal.

Based upon the foregoing Findings of Fact the Court hereby makes and enters the following:

CONCLUSIONS OF LAW

I.

The legal rights and relations of the parties with respect to whatever plaintiff described in his 1955 communications are governed by the executed submission agreement, Form 2538, of NOvember, 1955, to which the earlier communications of 1955 were preliminary and into which those preliminaries were merged.

II.

Plaintiff's communications to defendant in 1955 were not in confidence, and no relation of trust or confidence arose between the parties by reason of those communications or the circumstances attending them.

III.

Defendant has not breached any agreement with plaintiff or any duty to plaintiff, and has not appropriated any property of plaintiff.

IV.

On all of the facts with respect to his communications to defendant in 1955, and with respect to the can construction against which plaintiff's charges are laid, plaintiff has no basis for a claim to relief and in particular no basis for a claim against the form of seal used by defendant.

V.

The complaint, the amended complaint and plaintiff's contentions in the pretrial order are to be dismissed as to each of their three counts.

Dated at Portland, Oregon, this ___ day of _____, 1967.

_____
Chief Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PHILIP J. KENNEY, Plaintiff,	)	Civil No. 66-451
vs.	)	JUDGMENT
AMERICAN CAN COMPANY, a corporation, Defendant.	)	

This action having been heard at trial on July 3, 1967, on the agreed facts set forth in the pre-trial order of May 1, 1967, and on testimony and exhibits adduced in behalf of both parties, the contentions of the parties having been presented in briefs and oral argument, and plaintiff having not availed himself of the opportunity to seek certain additional evidence by post-trial interrogatories pursuant to leave given to him at trial, it is now, on the whole evidence and the Findings of Fact and

Conclusions of Law entered this day, ordered and adjudged as follows:

1. The complaint, the amended complaint and the contentions of the plaintiff are dismissed with prejudice as to each of their counts; and

2. On the waiver by defendant of any costs in this Court, there is no award of costs to either party.

Dated at Portland, Oregon, this ___ day of _____, 1967.

_____
Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP J. KENNEY, Appellant, vs. AMERICAN CAN COMPANY, a corporation, Appellee.	)	No. 22,236

[October 30, 1968]

Appeal from the United States District Court for the District of Oregon.

Before POPE and HAMLEY, Circuit Judges, and PLUMMER, District Judge.*

PER CURIAM:

This action, based on diversity of citizenship, was brought in the court below asserting that the appellant, plaintiff below, submitted to the appellee a certain idea concerning an "easy open" seal for can tops. He alleged that since 1963, defendant has sold coffee cans having an "easy open" seal. He asserts that the seal used by the defendant makes use of the plaintiff's original submitted idea. He claimed a right of recovery on theories not too clear but in general the claim is that this was a misappropriation of something which

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*The Honorable Raymond E. Plummer, United States District Judge for the District of Alaska.

belonged to plaintiff and for which the defendant owed the duty to compensate him.

After trial the court found that "[t]here is no evidence and no basis for an inference that..... defendant made any resort to or derived anything from the communications from plaintiff." Therefore "[d]efendant has not appropriated any idea disclosed to it by plaintiff." The court found that there was no relationship of trust or confidence between the parties. Accordingly the court entered judgment for the defendant and this appeal resulted.

Upon examination of the record here we find that the findings of the court below are amply supported by the evidence and that such findings are not clearly erroneous. Accordingly the judgment is affirmed.